Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

RICHARD MARK CUTCLIFFE, VICKI CUTCLIFFE, GEORGE RAGGIO, JR. and CAROLE RAGGIO,

Petitioners,

vs.

KEN JENNE, as Sheriff of Broward County, Florida,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Under *Elrod v. Burns,* 427 U.S. 347 (1976), and *Branti v. Finkel,* 445 U.S. 507 (1980), may a sheriff selectively terminate deputy sheriffs based on political patronage without an individualized determination of whether political loyalty is required for those deputies' positions?

II.

Does the acknowledged conflict among the circuit courts of appeals in the application of the *Elrod-Branti* formulation governing patronage dismissals of sheriffs' deputies require further elucidation by this Court of the standard, or its application?

PARTIES BELOW

The named Defendant / Appellee in the courts below, Broward County Sheriff Ronald Cochran, died while in office after judgment was entered by the Eleventh Circuit. In this Court, the newly-appointed Sheriff Ken Jenne has been substituted, in his official capacity.

In the district court, Norman Botsford was initially named as an individual capacity defendant, but was dismissed by stipulation.

TABLE OF CONTENTS

Page

Question presented i
Parties below ii
Table of authorities iv
Opinions below 1
Statement of jurisdiction 2
Constitutional provision involved 2
Statement of the case 3
Reasons for granting the writ 6
1. Conflict with this Court's *Elrod-Branti* Precedents 6
2. Conflict Among the Circuits Applying *Elrod-Branti* 8
Conclusion 9
Appendix:
Opinion of the Eleventh Circuit Court of Appeals (7/29/97) 1a
Order of the Eleventh Circuit denying petition for rehearing en banc (11/14/97) 20a
District Court Order Granting Defendant's Motion for Summary judgment (6/30/95) 24a

Contents

Page

Cases:

Branti v. Finkel, 445 U.S. 507 (1980) . . . . . *passim*
Cutcliffe v. Cochran, 117 F.3d 1353
(11th Cir. 1997), *rehearing en banc denied*
128 F.3d 1465 (11th Cir. 1997) 1
Elrod v. Burns, 427 U.S. 347 (1976) . . . . . *passim*
Hall v. Tollett, 128 F.3d 418 (6th Cir. 1997) 8
Jenkins v. Medford, 119 F.3d 1156
(4th Cir.1997) (en banc), *cert. denied*
___ U.S. ___, 1998 WL 23560 (1998) 8
O'Hare Truck Serv., Inc. v. City of Northlake,
___ U.S.___, 116 S.Ct. 2353 (1996) 6
Terry v. Cook, 866 F.2d 373 (11th Cir. 1989) . . . . *passim*

Constitutional provisions, Statutes and rules::

U.S. Const., Amend. I 2
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1331 2
28 U.S.C. § 1343(a)(3) 2
28 U.S.C. § 2202 3
42 U.S.C. § 1983 3
Eleventh Circuit Local Rule 35-6 2
Rule 13.3, Rules S.Ct. 2
§ 30.072(2), Fla. Stat. (West Supp. 1994) 5
§ 30.078, Fla. Stat. (West Supp. 1994) 5

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

RICHARD MARK CUTCLIFFE,
VICKI CUTCLIFFE,
GEORGE RAGGIO, JR. and
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Petitioners

vs.

KEN JENNE, as Sheriff of
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Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The decision below is reported at 117 F.3d 1353 (11th Cir. 1997), *rehrg. en banc denied* 128 F.3d 1465 (11th Cir.

1997), and is reprinted in the appendix at App. 1a and 20a. The district court's order granting summary judgment is unreported, and is reprinted in the appendix at App. 24a.

STATEMENT OF JURISDICTION

Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). Jurisdiction in the district court was pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3). Judgment was entered on July 29, 1997. Rehearing *en banc* was denied on November 14, 1997. Because Eleventh Circuit Rule 35-6 treats a suggestion for rehearing *en banc* as a petition for rehearing before the original panel, pursuant to Rule 13.3, Rule S.Ct., this petition is timely filed within 90 days of November 14, 1997.

CONSTITUTIONAL PROVISION INVOLVED

First Amendment, U.S. Const.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Four experienced sheriff's deputies — two sisters and their husbands, with 75 combined years of experience — claimed, *inter alia*, that their January 1993 termination by newly-elected Broward County Sheriff Ronald Cochran retaliated for their political speech favoring the former sheriff.

Petitioners were among approximately 80 deputies (out of 869) who were terminated by the incoming sheriff. According to the outgoing sheriff, Petitioners did not hold confidential, policymaking decisions in his administration. Petitioners brought an action in district court pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2202, seeking reinstatement and damages. After the stipulated dismissal of one defendant, the case proceeded against Sheriff Cochran in his official capacity.[1]

Following discovery, Sheriff Cochran filed a motion for summary judgment, claiming, *inter alia*, that under *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989), Petitioners were subject to political patronage dismissal merely by virtue of their positions as deputy sheriffs, and that the complaint thus "failed to state a claim under section 1983 for any kind of

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[1] The Sheriff counterclaimed for fraud/conversion of public funds, based on the plaintiffs' acceptance of payments of earned, unpaid accrued benefits upon their separation from the Sheriff's office. Plaintiffs moved to dismiss the counterclaim, but the district court never ruled on that motion until, in the July 12, 1995 Amended Final Judgment, the counterclaim was dismissed.

forced resignation' or `termination.'"

United States District Judge Wilkie Ferguson granted summary judgment for the Sheriff. The district court called this "a classic *Elrod-Branti* political patronage dismissal case," (*see Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980)), (App. 33a) and found that "these plaintiffs, as in *Terry*, were terminated on the basis of their loyalty and support for the former sheriff." App. 33a. The district court concluded that, under *Terry v. Cook*, *all* deputies occupy a position of "trust and confidence" with the sheriff, and thus fall within the narrow exception to the *Elrod-Branti* rule that patronage dismissals violate the First Amendment unless the hiring authority can demonstrate that political loyalty is an appropriate requirement for the effective performance of the public office involved. *Branti*, 445 U.S. at 518.

Petitioners appealed and the Eleventh Circuit Court of Appeals affirmed, on the authority of *Terry v. Cook*. Judge Rosemary Barkett noted that "plaintiffs may be entitled to a factual determination under *Branti* as to whether their positions implicate partisan political concerns in their effective functioning" but found Appellants' claim "precluded by *Terry*." App. 10a. Judge Barkett wrote that "[w]e are bound by that prior panel decision which only the en banc court can reverse." *Id.* A specially concurring judge, Senior District Judge Harris, made this observation:

> Is there confusion in this area of the law? Members of the Supreme Court are

> among those who have expressed their belief that there is, and my study of the subject matter leads me to the same conclusion.

App. 16a (footnote omitted). He was of the opinion that *Terry* was correctly decided and that "this case should end here" because "the issue now is dealt with by statute." (App.19a).[2] But Judge Harris also wrote that "[I] also believe that the subject matter cries out for elucidation from the Supreme Court in some appropriate future case." App. 19a.

Petitioners sought rehearing *en banc* on the ground that *Terry v. Cook*, and thus the panel's reasoning in this case, conflicts with this Court's *Elrod-Branti* requirements. Rehearing *en banc* was denied, with Judge Barkett dissenting. This petition followed.

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[2] Subsequent to the terminations in this case, Florida Statutes were amended to preclude political patronage terminations of deputy sheriffs. *See* § 30.072 (2), Fla. Stat. (West Supp. 1994), excluding certain defined "managerial, confidential, and policymaking" positions from the definition of "deputy." *See also* § 30.078, Fla. Stat. (West Supp. 1994) (Continuation of appointment after a change in sheriff), *amended* Ch. 95-155 § 4 (West Fla. Session Laws 1995), precluding terminations for off-duty political activity, or for discriminatory reasons. The amended statutes provided no basis for reinstatement of the petitioners.

REASONS FOR GRANTING THE WRIT

1. Conflict with this Court's *Elrod-Branti* Precedents

The decision below, mandated as it was by the Eleventh Circuit's decision in *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989) (discussed at App. 7a, 10a) conflicts with this Court's teachings in *Elrod v. Burns,* 427 U.S. 347 (1976), and *Branti v. Finkel,* 445 U.S. 507 (1980). Judge Barkett, dissenting from the denial of *en banc* review, stated that "I believe that this court's opinion in *Terry v. Cook*. . . is at odds with Supreme Court precedent." App. 21a.

Elrod-Branti generally forbids patronage dismissals of public employees, unless "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518. That policymaker/confidential employee inquiry provides a narrow exception to the general rule, and requires an individualized factual determination of the employer's justifications for the dismissal, based on the nature of the position of the terminated employee. *Id.* at 518-520. *See O'Hare Truck Serv., Inc. v. City of Northlake*, ___ U.S.___, ___, 116 S.Ct. 2353, 2358 (1996) ("[T]he inquiry is whether the affiliation requirement is a reasonable one, so it is inevitable that some case-by-case adjudication will be required even where political affiliation is the test the government has imposed."). Close cases should be resolved in favor of the employee. (App. 6a) (citing *Elrod,* 427 U.S. at 368, 96 S.Ct. at 2687).

But the Eleventh Circuit has eliminated any individualized inquiry when sheriffs' deputies complain about patronage dismissals, and has concluded as a matter of law that "loyalty to the individual sheriff and the goals and policies he seeks to implement through his office is an appropriate requirement for the effective performance of a deputy sheriff." *Terry v. Cook*, 866 F.2d at 377. *Terry* gives the sheriff, as employer, "absolute authority." *Id.* In so doing, the Eleventh Circuit has effectively eliminated the First Amendment protection from unconstitutional patronage dismissals of deputies, despite this Court's directives to the contrary. Further, the assumptions about deputies' need for loyalty to the sheriff belie the reality of large sheriffs' offices, such as that where petitioners had been employed. The district court observed:

> That a sheriff in a 1990's large and diverse metropolitan community should have the power to terminate all 869 deputies, on the basis of a political litmus test, is, as contended, an archaic proposition.

App. 33a.

The Eleventh Circuit's misapplication of the *Elrod-Branti* test in the context of sheriffs' deputies is a basis for certiorari review, in order to preserve deputies' First Amendment right not to be subject to political patronage firings without an individual determination based on the relevant facts of each deputy's position.

2. Conflict Among the Circuits Applying *Elrod-Branti*

A second ground for certiorari review is that the circuit courts of appeals are in conflict with one another on the proper application of *Elrod-Branti*. The conflict was noted by the court below, which counted four circuits which afford deputies more First Amendment protection than does the Eleventh Circuit. (App. 8a) ("After examining the various tasks of deputy sheriffs, courts in the Third, Fourth, Fifth, and Tenth Circuits have ruled that those job functions do not require political affiliation with the elected sheriff for their effective performance.") (cases cited in footnote 3, App. 8a). Since the decision below, the Fourth Circuit revisited this question in *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir.1997) (en banc), *cert. denied* ___ U.S. ___, 1998 WL 23560 (1998), and overruled *Jones v. Dodson*, 727 F.2d 1329 (4th Cir. 1984), which had been cited by the court below. (App. 9a n.3).[3] Thus, the Fourth Circuit is aligned with the Eleventh, and the Seventh, which have held that deputy sheriffs may be hired or fired on political grounds. App. 9a (citing cases). And, the Sixth Circuit has joined the fray, aligning itself with the Third, Fifth, and Tenth Circuits. *Hall v. Tollett*, 128 F.3d 418 (6th Cir. 1997) ("the position of Cumberland County deputy sheriff does not fall within the *Branti* exception for patronage based dismissals").

It is that conflict which led Senior District Judge

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[3] The *Medford* court noted that "[d]espite the [Supreme] Court's guidance, lower courts have issued `conflicting and confusing' opinions." 119 F.3d at 1160 (citation omitted).

Harris, specially concurring below, to bemoan the "confusion": "Is there confusion in this area of the law? Members of the Supreme Court are among those who have expressed their belief that there is, and my study of the subject matter leads me to the same conclusion." (App. 16a) (footnote omitted). He concluded with "I also believe that the subject matter cries out for elucidation from the Supreme Court in some appropriate future case." App. 19a. Amen.

CONCLUSION

For the foregoing reasons, certiorari should be granted, the decision below reversed, and the case remanded for trial under the correct *Elrod-Branti* First Amendment standards.

Respectfully submitted,

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February __, 1998

INDEX TO APPENDIX

Page

July 29, 1997 Opinion of the
Eleventh Circuit Court of Appeals 1a

November 14, 1997 Order of the
Eleventh Circuit Court of Appeals,
denying rehearing *en banc* 19a

June 20, 1995 Order Granting Defendant's
Motion for Summary Judgment, United States
District Court, Southern District of Florida 24a

APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT.
Nos. 95-4982 & 95-5176.

Richard Mark CUTCLIFFE, Vicki Cutcliffe, George Raggio, Jr., Carole Raggio,
Plaintiffs-Counter-Defendants-Appellants,
v.
Ronald COCHRAN, as Sheriff of Broward County, Florida, Norman Botsford, individually,
Defendants-Counter-Claimants-Appellees.

July 29, 1997.

Appeals from the United States District Court for the Southern District of Florida. (No. 93-6099-CIV-WDF), Wilkie D. Ferguson, Jr., Judge.

Before BARKETT, Circuit Judge, KRAVITCH, Senior Circuit Judge, and HARRIS *, Senior District Judge.

* Honorable Stanley S. Harris, Senior U.S. District Judge for the District of Columbia, sitting by designation.

BARKETT, Circuit Judge:

In this action, based on 42 U.S.C. § 1983, alleging dismissal based on the exercise of protected speech and association, plaintiffs, former deputy sheriffs in the Broward County Sheriff's Office, appeal the district court's summary

judgment in favor of Ronald Cochran, Sheriff of Broward County. The district court found that the deputies had been fired because of political affiliation. The court then concluded that under *Elrod v. Burns,* 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), *Branti v. Finkel,* 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), and *Terry v. Cook,* 866 F.2d 373 (11th Cir.1989), political affiliation was an appropriate requirement for the position of deputy sheriff, and granted Cochran's motion for summary judgment.

Defendant Ronald Cochran, a Democrat, was elected Sheriff of Broward County in a contest with a Republican candidate who had defeated incumbent Sheriff Nick Navarro in the Republican primary. The plaintiffs, appointed to their deputy sheriff positions by Navarro, actively supported him in the primary election. They allege that they were dismissed from these positions in retaliation for their political activities on behalf of Navarro and for their familial association with a former opponent of Sheriff Cochran, violating their First Amendment rights to political speech and political and intimate association.

We review grants of summary judgment de novo, applying the same legal standard that the district court used. *McCabe v. Sharrett,* 12 F.3d 1558, 1560 (11th Cir.1994). Summary judgment is appropriate if, after examining the entire record, the court concludes there is no genuine issue of material fact. Fed.R.Civ.P. 56(c).

Plaintiffs claim that their dismissals violated political speech, familial association, and political affiliation or

association rights protected by the First Amendment. Plaintiffs can avoid summary judgment by pointing to evidence in the record which, if credited, would permit a rational fact- finder to conclude that their conduct was constitutionally protected and that the protected conduct was a substantial factor in their dismissals. *Mt. Healthy City School District Board of Educ. v. Doyle,* 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).

Plaintiffs have asserted little more than the fact of their familial relationship to Cochran's alleged political nemesis, Leo Callahan, to support their view that this relationship was a substantial or motivating factor in their dismissals. As a result, they have failed to create a question of material fact which would warrant presentation of their familial association claim to a fact- finder; summary judgment on that claim, therefore, was appropriate. We turn now to plaintiffs' claims that their dismissals violated their First Amendment speech and association rights.

It is well settled that an individual is not stripped of First Amendment rights simply by virtue of government employment. "Absent some reasonably appropriate requirement, government may not make public employment subject to the express condition of political beliefs or prescribed expression." *O'Hare Truck Service. Inc. v. City of Northlake,* — U.S. ----, ----, 116 S.Ct. 2353, 2357, 135 L.Ed.2d 874 (1996). In fashioning legal standards for evaluating which restrictions are "reasonably appropriate," the Supreme Court has developed two lines of inquiry: the *Elrod-Branti* standard for discrimination based on political

affiliation and a balancing test for discrimination based on political speech. *See Pickering v. Board of Education,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); *Connick v. Myers,* 461 U.S. 138, 147, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983). *See also Bd. of Cty. Com'rs, Wabaunsee County, KS. v. Umbehr,* — U.S. ----, ----, 116 S.Ct. 2342, 2347, 135 L.Ed.2d 843 (1996) (collecting cases).

The Supreme Court first addressed the issue of political affiliation as a legitimate employment criterion in *Elrod v. Burns.* The case involved a newly elected Democratic sheriff who fired various Republican employees in the sheriff's office and held that politically motivated discharges were unconstitutional because they amounted to a denial of a government benefit based on an unconstitutional condition, namely the coercion of an employee's freedom of association. While the government might legitimately use such practices in some circumstances, the strict scrutiny applicable to infringements of First Amendment rights requires the government to show that the practice furthers a vital government interest by the least restrictive means. The plurality[1] reasoned:

> if conditioning the retention of public employment on the employee's support of the in- party is to survive constitutional challenge, it must further

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[1] Justice Brennan wrote an opinion, joined by Justices White and Marshall. Justice Stewart wrote a separate opinion concurring only in the judgment that was joined by Justice Blackmun.

> some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights.

Id. at 362, 96 S.Ct. at 2685. Thus, patronage dismissals were not the least restrictive means of achieving this end because public employees could be discharged for insubordination or poor job performance when those bases in fact exist. *Id.* at 364-67, 96 S.Ct. at 2685-86. Likewise, the interest of preserving the democratic process and partisan politics does not warrant such dismissals because "patronage [also] is an effective *impediment* to associational and speech freedoms ... the gain to representative government provided by the practice of patronage, if any, would be insufficient to justify its sacrifice of First Amendment rights." *Id.* at 369-70, 96 S.Ct. at 2688 (emphasis added).

Also incapable of fully supporting patronage dismissals is the notion that new administrations in a representative government need the political loyalty of employees in order to avoid potentially obstructionist tactics. "The justification is not without force, but is nevertheless inadequate to validate patronage wholesale ... Limiting patronage dismissals to policymaking positions is sufficient to achieve this governmental end." *Id.* at 367, 96 S.Ct. at 2687. In delineating the exception, it was recognized that:

> No clear line can be drawn between policymaking and nonpolicymaking positions. While

> nonpolicymaking individuals usually have limited responsibility, that is not to say that one with a number of responsibilities is necessarily in a policymaking position. The nature of the responsibilities is critical. Employee supervisors, for example, may have many responsibilities, but those responsibilities may have only limited and well- defined objectives. An employee with responsibilities that are not well defined or are of broad scope more likely functions in a policymaking position. In determining whether an employee occupies a policymaking position, consideration should also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals.

Id. at 367-68, 96 S.Ct. at 2687. Finally, the plurality in *Elrod* held that the government had not met its burden in demonstrating an interest sufficient to override an encroachment on the First Amendment rights of a public employee, and that close cases should be resolved in favor of the employee. *Id.* at 368, 96 S.Ct. at 2687.

In *Branti v. Finkel,* 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), the majority of the Court held that the dismissal of two assistant public defenders, who were among six threatened with dismissal from a staff of nine because they were Republicans, violated the First Amendment. In its holding, the Court refined the applicability of the First Amendment to policymaking positions:

> [t]he ultimate inquiry is not whether the label "policymaker' or "confidential' fits a particular position; rather the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."

Id. at 518, 100 S.Ct. at 1295.

Branti recognized that circumstances may exist in which "a position may be appropriately considered political even though it is neither confidential nor policymaking in character" but that "party affiliation is not necessarily relevant to every policymaking or confidential position." *Id.* at 518, 100 S.Ct. at 1294.

Shortly after *Branti* was decided, this court decided *Terry v. Cook.* In *Terry,* a newly elected sheriff refused to reappoint any of the deputy sheriffs, clerks, jailers or process servers who served under his predecessor. The court held that "loyalty to the individual sheriff and the goals and policies he seeks to implement ... is an appropriate requirement for the effective performance of a deputy sheriff." *Id.* at 377. The court described deputy sheriffs as the "alter ego" of the sheriff and reasoned that the "closeness and cooperation required between sheriffs and their deputies necessitates the sheriff's absolute authority over their appointment and/or retention." *Id.* at 377. The court concluded that deputy sheriffs were susceptible to patronage dismissals.

In this case, although plaintiffs allege that their

dismissals were motivated by political association (among other factors), they argue that *Terry* is not controlling because Cochran has engaged in selective dismissals, and not the "wholesale" or "en masse" dismissals conducted in *Terry*. We are not persuaded by this distinction. While *Terry* did involve the dismissal of the entire deputy sheriff force, that factor is not essential to its broad holding that sheriffs have the authority to fire their deputies for political affiliation reasons. Accordingly, we find *Terry* controlling, although we also believe that *Terry* should be revisited en banc because it may be viewed as inconsistent with *Branti*.

Branti flatly rejects the notion that policy makers qua policy makers should be subject to a political affiliation requirement; rather, it demands a showing that the position, policy- making or otherwise, implicates partisan political concerns in its effective functioning. Under *Branti,* political fealty could be required of deputy sheriffs whose job duties involved handling information of a partisan political nature. But other deputy sheriffs, involved in investigating crimes, patrolling roads, or transporting prisoners, may never deal with such sensitive information or confidences. *Terry* could be viewed as ignoring this distinction, and offering no explanation for how the duties of individual deputy sheriffs relates to party affiliation.[2]

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[2] We note that the *Terry* court properly applies *Branti* when it turns to the claims brought by the other personnel in the sheriff's office: "This is a determination that depends on the actual responsibilities of each position and the relationship of each to the sheriff." *Id.* at 378.

Appendix A

The *Terry* court's confusion in applying the *Elrod-Branti* standard is not surprising as there appears to be a conflict among the circuits in patronage cases arising in sheriffs' offices. After examining the various tasks of deputy sheriffs, courts in the Third, Fourth, Fifth, and Tenth Circuits have ruled that those job functions do not require political affiliation with the elected sheriff for their effective performance. Thus, deputy sheriffs are entitled to protection from patronage dismissals.[3] In addition to this circuit, only the Seventh Circuit has held that deputy sheriffs may be hired or fired on political grounds.

In *Upton v. Thompson,* 930 F.2d 1209 (7th Cir.1991), *cert. denied,* 503 U.S. 906, 112 S.Ct. 1262, 117 L.Ed.2d 491 (1992), and in *Dimmig v. Wahl,* 983 F.2d 86 (7th Cir.), *cert. denied,* 510 U.S. 861, 114 S.Ct. 176, 126 L.Ed.2d 135 (1993), the Seventh Circuit held that political affiliation was an appropriate requirement for the job of deputy sheriff because a sheriff's political fortunes were so closely tied to the job performance of deputy sheriffs. This reasoning was adopted from an earlier Seventh Circuit case, *Tomczak v. City of Chicago,* 765 F.2d 633, 641 (7th Cir.1985).[4]

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[3] *Burns v. County of Cambria*, 971 F.2d 1015, 1022 (3rd Cir. 1992), *cert. denied*, 506 U.S. 1081, 113 S.Ct. 1049, 122 L.Ed.2d 357 (1993); *Jones v. Dodson*, 727 F.2d 1329 (4th Cir. 1984); *Barrett v. Thomas*, 649 F.2d 1193, 1201 (5th Cir. 1981), *cert. denied*, 456 U.S. 925, 102 S.Ct. 1969, 72 L.Ed.2d 440 (1982); *Francia v. White*, 594 F.2d 778 (10th Cir. 1979).

[4] Application of the Seventh Circuit's broad test has led to results far afield from *Branti*. In *Americanos v. Carter*, 74 F.3d 138

Notwithstanding that plaintiffs may be entitled to a factual determination under *Branti* as to whether their positions implicate partisan political concerns in their effective functioning, we read their claim as precluded by *Terry*. We are bound by that prior panel decision which only the en banc court can reverse.

Plaintiffs also allege that, rather than mere political affiliation, other conduct protected by the First Amendment prompted their dismissals. Specifically, plaintiffs asserted in their complaint that they "participated in public political activity in support of Navarro on several occasions ... and

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(7th Cir. 1996), for example, the Seventh Circuit concluded that every Deputy Attorney General in Indiana's Attorney General's Office was subject to patronage dismissal because each had "meaningful" input into governmental decisionmaking on issues where there is room for principled disagreement on goals and implementation." *Id.* at 141-42. *Americanos* appears to lie in sharp contrast to the facts of *Branti* , where he questioned whether, under the holding in *Branti*, the United States Attrorney for each district, not Assistant U.S. Attorneys, could be dismissed for political reasons:

> [I]t would be difficult to say, under the Court's standard, that "partisan" concerns properly are relevant to the performance of the duties of a United States Attorney.

445 U.S. at 524, 100 S.Ct. at 1298 (Powell, J., dissenting).

Although *Branti* may permit the dismissal of the U.S. Attorney of a district and some of his or her chief deputies, we believe *Branti* would not permit the dismissal of all Assistant U.S. Attorneys for patronage reasons.

contributed personal funds to Navarro's campaign." This allegation simply conveys plaintiffs' political affiliation. Had there been allegations that the expressions involved more than bare statements of support for a candidate, the claim would deserve a more detailed analysis under *Pickering*.[5] At this point, as in *Branti,* the only interest at issue is the right of political affiliation which, that case teaches us, cannot be overcome except by a determination that affiliation is essential to the employee's effectiveness. The record supports the district court's finding that plaintiffs "were terminated on the basis of their loyalty and support for the former sheriff. This is a classic *Elrod-Branti* political patronage dismissal case."

Under *Terry v. Cook,* defendant was entitled to a grant of summary judgment.

AFFIRMED.

KRAVITCH, Senior Circuit Judge, specially concurring:

I join Judge Barkett's opinion for the court, except that I take no position regarding whether the en banc court should or should not reexamine the holding of *Terry v. Cook,* 866 F.2d 373 (11th Cir.1989).

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[5] More precisely, had there been further allegations that (1) plaintiffs had engaged in expressive conduct beyond mere manifestation of political affiliation: and (2) the conduct was a "substantial" or "motivating" factor in the dismissals, their claim would warrant a *Pickering* analysis.

Appendix A

HARRIS, Senior District Judge, specially concurring:

I concur in the result reached by the majority, believing, as Judges Barkett and Kravitch do, that this court's opinion in *Terry v. Cook,* 866 F.2d 373 (11th Cir. 1989), is controlling and necessitates affirmance. I also believe, however, that certain aspects of this case warrant additional comments, some of which reflect disagreement with respect to portions of the majority opinion.

An analysis of the legal issues inevitably begins with the unique case of *Elrod v. Burns,* 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). There, two diametrically opposed viewpoints were expressed: one by Justice Brennan, joined by Justices White and Marshall, and one by Justice Powell, joined by Chief Justice Burger and Justice Rehnquist. Thus, there were three votes one way, and three the other. Such a split, obviously, would not have been affirmatively dispositive. So, enter Justice Stewart, joined by Justice Blackmun. To create a 5-3 disposition of the case, Justice Stewart stated both briefly and clearly (427 U.S. at 374-75, 96 S.Ct. at 2690):

> Although I cannot join the plurality's wide-ranging opinion, I can and do concur in its judgment.
>
> This case does not require us to consider the broad contours of the so- called patronage system, with all its variations and permutations. In particular, it does not require us to consider the constitutional validity of a system that confines the hiring of some

> governmental employees to those of a particular political party, and I would intimate no views whatever on that question.
>
> The single substantive question involved in this case is whether a nonpolicy making, nonconfidential government employee can be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs. I agree with the plurality that he cannot. See *Perry v. Sindermann,* 408 U.S. 593, 597-598, 92 S.Ct. 2694, 2697-2698, 33 L.Ed.2d 570.

It is noted that Justice Stewart characterized Justice Brennan's opinion as a "plurality" opinion, and typically it is so labeled (or mislabeled). However, analytically it seems to me that the use of that term elevates Justice Brennan's opinion–thoughtful as it may have been, as was Justice Powell's opposing opinion–to a status beyond that to which it is entitled. It is my belief that *Elrod v. Burns* stands for what Justice Stewart said, and that Justice Brennan's "wide-ranging opinion" does not have meaningful viability beyond the limited contours set by Justices Stewart and Blackmun. Thus, I do not believe that the majority's reliance upon Justice Brennan's opinion, beyond the boundaries established by Justice Stewart's brief opinion, is justified.[1]

---

[1] I believe the same is true with respect to this court's opinion in *Parrish v Nikolits*, 86 F.3d 1088 (11th Cir. 1996), in which (in an opinion also written by Judge Barkett) there are numerous references to Justice Brennan's reasoning in *Elrod v. Burns*.

Appendix A

The next relevant case to be decided by the Supreme Court was *Branti v. Finkel,* 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980). There, a true majority opinion was issued, written by Justice Stevens. The interrelationship between *Branti* and *Elrod* is intriguing. Initially, consistent with what I have suggested, Justice Stevens found it necessary to cobble together the separate opinions of Justices Brennan and Stewart in *Elrod v. Burns* in order to extract a holding, however limited, from that case. *See, e.g., id.* at 516-17, 100 S.Ct. at 1294. The case involved two Assistant Public Defenders from Rockland County, New York, who faced dismissal solely because of their political affiliation. Thus, *Branti* was a pure political patronage case.[2] The Court concluded that the county Assistant Public Defenders could not be dismissed based only upon their political affiliation. Justice Stewart, whose acquiescence in the judgment was essential to the decision in *Elrod,* dissented in *Branti* (as did Justices Powell and Rehnquist). His dissent began (*id.* at 521, 100 S.Ct. at 1296):

---

[2] It should be noted that in *Elrod v. Burns*, the Chief Justice also wrote a dissent, beginning it by stating (427 U.S. at 375, 96 S.Ct. at 2690):

> The Court's decision today represents a significant intrusion into the area of legislative and policy concerns–the sort of intrusion Mr. Justice BRENNAN has recently protested in other contexts.

> I joined the judgment of the Court in *Elrod v. Burns,* 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547, because it is my view that, under the First and Fourteenth Amendments, "a nonpolicymaking, nonconfidential government employee can[not] be discharged ... from a job that he is satisfactorily performing upon the sole ground of his political beliefs." *Id.,* at 375, 96 S.Ct., at 2690. That judgment in my opinion does not control the present case for the simple reason that the respondents here clearly are not "nonconfidential" employees.
>
> In his dissent in *Branti,* Justice Powell noted in part (*id.* at 524, 100 S.Ct. at 1297):
>
> In *Elrod v. Burns,* three Members of the Court joined a plurality opinion concluding that nonpolicymaking employees could not be dismissed on the basis of political affiliation. Two Members of the Court joined an opinion concurring in the judgment and stating that nonpolicymaking, nonconfidential employees could not be so dismissed. Notwithstanding its purported reliance upon the holding of *Elrod,* the Court today ignores the limitations inherent in both views. (Internal citations omitted.)

Justice Powell shortly thereafter stated (*id.* at 525, 100 S.Ct. at 1297):

> The standard articulated by the Court is framed in vague and sweeping language certain to create vast uncertainty.[3]

Is there confusion in this area of the law? Members of the Supreme Court are among those who have expressed their belief that there is, and my study of the subject matter leads me to the same conclusion.[4] The majority in this case expresses its belief that there was "confusion" on the part of this court's *Terry* panel in deciding that case. To the extent that there can be an absence of confusion in this area of the law (and I acknowledge that I consider Justice Powell's reasoning to be more sound than that of those espousing conflicting views), I believe the *Terry* panel correctly decided

---

[3] Justice Powell went on, *inter alia*, to point out some of the problems related by *Branti*, including a reference to how important political affiliation is to the selection by the President of United States Attorneys. (445 U.S. at 525-27, 100 S.Ct. at 1298). Of course, Justice Powell is aware that United States Attorneys are presidential appointments who serve at the pleasure of the President. It puzzles me as to how the majority in this case can take Justice Powell's comments in a dissent in a case involving county Assistant Public Defenders, bring them into this case – which involves county Deputy Sheriffs – and volunteer dicta as to what may or may not be done with respect to employment of Assistant United States Attorneys. *See* fn. 4 of majority opinion.

[4] This uncertainty should make a prudent court – like the panel in *Terry v. Cook* – reluctant to extend *Branti* much beyond both its factual context and the true meaning of *Elrod*.

the case before it.

Judge Barkett's opinion for the majority states that "we also believe that *Terry* should be revisited en banc because it may be viewed as inconsistent with *Branti*." It is implied that the way to revisit *Terry* is through this case. I respectfully disagree. Judge Kravitch, in her special concurrence, expressly takes no position on this question. There are several reasons for my disagreement. First, I think *Terry v. Cook* was correctly decided. Second, *Branti* was a pure political affiliation case (although, as noted, Justice Stewart dissented in *Branti* because he viewed Assistant Public Defenders as "clearly ... not "non- confidential' employees.") Here, appellants engaged in extensive activities on behalf of one of Cochran's opponents.[5] In footnote 1 in his summary

---

[5] The appellants' depositions were taken. Their principal political activities were conducted in the primary, in support of a candidate who would have faced Sheriff Cochran had he not lost in the primary. The Cutcliffe appellants (Mark and Vicki) gave money personally (perhaps the maximum of $2,000) and collected more than an additional $10,000 for Navarro. They purchased campaign tickets (barbecues, etc.) and sold them to co-workers. They put Navarro signs around their home. They and their children stuffed envelopes for Navarro's re-election committee, and Vicki told her co-workers that Navarro would be a better sheriff than Cochran.

The Raggio appellants (George and Carole) contributed the maximum allowable amount to Navarro's campaign. Carole solicited funds from business people, and carried Navarro signs in public. She attended as many Navarro functions as she could, and recommended Navarro as the better choice, although she did not openly criticize Cochran. Other than contributing the maximum permissible to Navarro's campaign, George Raggio did not describe his support specifically.

judgment opinion, the trial judge stated:

> Although Sheriff Cochran was the Democratic candidate and Navarro ran as a Republican, affiliation with a particular party is not the issue here. Political patronage in this case refers not to political party affiliation, but rather to what other courts have described as the employees' "commonality of political purpose and support." See, e.g., *Williams v. City of River Rouge*, 909 F.2d 151, 153, n.4 (6th Cir. 1990).

Third, to me there is a significant difference between a county's Assistant Public Defender (as in *Branti*) and a county's Deputy Sheriff, the former's job is simply to defend those charged with a crime, while the latter's responsibilities frequently involve a high degree of trust in sensitive areas of law enforcement, including possible public corruption.[6] Fourth, even if the *Terry* panel could be considered to have decided that case imperfectly, the situation before us will not recur under currently existing statutory law. Since 1995, Florida's law has provided as follows:

> 30.078. Continuation of appointment after a change in sheriff

---

[6] The *Terry v. Cook* panel stated in part (866 F.2d at 377):

> The closeness and cooperation required between sheriffs and their deputies necessitates the sheriff's absolute authority over their appointment and/or retention.

Appendix A

When a newly elected or appointed sheriff assumes office, the incoming sheriff may not terminate the employment of any deputy sheriff covered by ss. 30.071-30.079 for lawful off- duty political activity or for a discriminatory reason. The incoming sheriff may replace deputy sheriffs assigned to managerial, confidential, or policymaking positions or part- time deputy sheriffs.

In sum, I concur in the result, and an of the belief that *Terry v. Cook* was decided correctly. While the decision as to whether to revisit that opinion through going en banc in this case is up to my distinguished temporary colleagues, the issue now is dealt with by statute and I believe this case should end here–although I also believe that the subject matter cries out for elucidation from the Supreme Court in some appropriate future case.

Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 95-4982 & 95-5176

D.C. Docket No. 93-6099-CIV-WDF

RICHARD MARK CUTCLIFFE,
VICKI CUTCLIFFE, GEORGE RAGGIO, JR.,
CAROLE RAGGIO,

Plaintiffs-Counter-
Defendants-Appellants,

versus

RONALD COCHRAN, as Sheriff of Broward
County, Florida, NORMAN BOTSFORD,
individually,

Defendants-Counter-
Claimants-Appellees.

Appeals from the United States District Court
for the Southern District of Florida

(November 14, 1997)

ON PETITION FOR REHEARING EN BANC

(Opinion July 29, 1997, 11th Cir., 117 F.3d 1353)

Before HATCHETT, Chief Judge, TJOFLAT, ANDERSON, EDMONDSON, COX, BIRCH, DUBINA, BLACK,

CARNES and BARKETT, Circuit Judges.

PER CURIAM:

The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing En Banc is DENIED.

BARKETT, Circuit Judge, dissenting:

I respectfully dissent from the court's denial of en banc rehearing in this case. For the reasons articulated in the majority opinion, I believe that this court's opinion in *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989), is at odds with Supreme Court precedent. I also believe that en banc consideration is necessary to clarify the law in this circuit as to the permissibility of political patronage dismissals of any and all deputy sheriffs under the First Amendment in light of *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980). Our confusion on this issue is apparent from our opinions in *Terry* and, most recently, *Brett v. Jefferson County*, 123 F.3d 1429 (11th Cir. 1997).

The *Terry* court concluded that a sheriff possesses "absolute authority" to decline to reinstate any deputy sheriffs who did not support him politically because "loyalty to the individual sheriff and the goals and policies he seeks to implement . . . is an appropriate requirement for the effective

performance of a deputy sheriff." *Terry*, 866 F.2d at 377. Thus, *Terry* appears to conflict with the Supreme Court's directive in *Branti* that in determining whether political affiliation is a legitimate requirement for a particular type of government employment,

> the ultimate inquiry is not whether the label "policymaker" or "confidential" fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

Branti, 445 U.S. at 518.

Nonetheless, the majority opinion in *Cutcliffe* applied *Terry* to preclude an identical political patronage dismissal claim, as only the en banc court can reverse a prior panel decision. Shortly after *Cutcliffe* was decided, however, this court decided *Brett v. Jefferson County*. In *Brett*, as in *Cutcliffe*, upon taking office, a newly elected sheriff declined to reappoint four deputy sheriffs who failed to support him in the primary election and who actively supported his opponent. The sheriff conceded that his decision not to reappoint the deputies "was based on their speech and actions during the election," *Brett*, 123 F.3d at 1431, and the deputy sheriffs filed a complaint alleging, *inter alia*, that the denial of reappointment for political patronage reasons violated their First Amendment rights. Finding that the district court erred in disposing of the deputy sheriffs' First Amendment claim on summary judgment without applying either the *Elrod-Branti*

or the *Pickering* balancing test, the court remanded the case "for additional fact finding so that the district court can decide which test properly to apply in the First Amendment analysis." *Id.* at 1433. Significantly, the court did not view the deputy sheriffs' patronage dismissal claim as precluded by this court's prior opinions in *Terry* and *Cutcliffe,* although the claim raised by the plaintiffs in *Brett* is virtually identical to the claim raised in *Cutcliffe.*

Although, as Judge Harris observed in his special concurrence in *Cutcliffe*, recent statutory changes in Florida law make it unlikely that this issue will recur in that state,[1] that this issue will likely recur in this circuit is evidenced by the fact that *Terry* was an Alabama case, while *Brett* arose in Georgia. Accordingly, because I regard our precedent in this area as both in conflict with Supreme Court precedent and internally inconsistent, I believe that this is precisely the kind of case that merits en banc consideration.

---

[1] Since 1995, Chapter 30.078 of the Florida Statutes has provided:

> When a newly elected or appointed sheriff assumes office, the incoming sheriff may not terminate the employment of any deputy sheriff covered by §§ 30.071 - 30.079 for lawful off-duty political activity or for a discriminatory reason. The incoming sheriff may replace deputy sheriffs assigned to managerial, confidential, or policymaking positions or part-time deputy sheriffs.

Fla. Stat. ch. 30.078.

Appendix A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 93-6099-CIV-FERGUSON

RICHARD MARK CUTCLIFFE,
VICKI CUTCLIFFE, et al.

plaintiffs,

vs.

RONALD COCHRAN,
as Sheriff of

Broward County, Florida,

Defendant.

_____/

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

In 1992, the defendant Ronald Cochran, a Democrat, was elected Sheriff of Broward County in a contest with Republican, J. Howard, who had defeated the incumbent Sheriff Nick Navarro in the Republican primary. The plaintiffs, who were appointed to their positions by Navarro, were active supporters of Navarro in his primary election loss. The plaintiffs allege, among other things, that they were fired in retaliation for protected speech and familial association with a former opponent of Sheriff Cochran. Further, they contend that their dismissals were selective and not wholesale or en

masse-- a factor they argue has legal significance. In defense, the Sheriff alleges that the deputies held confidential and policymaking positions within the Sheriffs office and therefore, fell within the exception to the patronage dismissal rule as outlined in *Elrod v. Burns,* 427U.S. 347, 96 S.Ct. 2673 (1976).[2]

The plaintiffs were all high-ranking deputy sheriffs in the Broward County Sheriffs Office. Richard Mark Cutcliffe was a Captain and Commander of Special Operations in charge of one hundred and forty-four deputies and ninety-eight civilian employees.

George Raggio held the rank of Major and title of Assistant Director, Department of Law Enforcement, Field Services. He supervised approximately twelve captains who were in charge of half of all the districts within the Sheriffs jurisdiction.

Piaintiff Vicki Cutciiffe held the position of Captain, Department of law Enforcement. She is married to plaintiff Richard Mark Cutcliffe. She commanded approximately forty individuals, mostly deputies. Mrs. Cutcliffe's duties included relations with the community and other law enforcement

---

[2] Although Sheriff Cochran was the Democratic candidate and Navarro ran as a Republican, affiliation with a particular party is not the issue here. Political patronage in this case refers not to party affiliation, but rather to what other courts have described as the employees' "commonality of political purpose and support." See, e.g., *Williams v. City of River Rouge*, 909 F.2d 151, 153, n.4 (6th Cir. 1990).

agencies.

Plaintiff Carole Raggio held the rank of Lieutenant within the Road Patrol Division. She is the wife of plaintiff George Raggio and sister of plaintiff Vicki Cutcliffe. As Shift Commander in the Road Patrol Division, Carole Raggio supervised two sergeants and between fifteen and twenty deputies.

There are over eight hundred deputies in the Sheriffs office with fifty-nine holding ranks above sergeant. Broward County's population, according to a 1991 census, is 1.3 million. After the election, the defendant allegedly fired approximately ten percent of the staff in an alleged "purge" of Navarro loyalists.

LEGAL DISCUSSION

Issue As Framed By Motion For Summary Judgment

It is well established that even where, as here, a governmental employer has the discretion to fire an employee at will, the employer may not discharge the employee for an illegal reason. *See Keyishian v. Board of Regents, 385* U.S. 589, 87 S.Ct. *675,* 684-685(1967) (a state cannot condition public employment on the surrender of employee's constitutionally protected rights). The plaintiffs filed this

lawsuit alleging that in discharging them, Cochran violated their First Amendment rights of speech and familial association.

Relying on the narrow exception to the general rule that an employee cannot be dismissed on the basis of his political affiliation, as explained in the *Elrod-Branti* line of cases, the defendant argues that he is entitled to summary judgment because, as a matter of law, there was no First Amendment violation. This case, according to Cochran, falls squarely under *Terry v. Cook,* 866 F.2d 373 (11th Cir. 1989), where it was held that a newly-elected sheriffs dismissal of deputy sheriffs, on the basis of political patronage, is not actionable.

Political Affiliation As Job Requirement

The constitutionality of political patronage practices, including dismissals, was addressed in *Elrod v. Burns,* 427 U.S. 374, 96 S.Ct. 2673 (1976), where it was held that such dismissals are generally unconstitutional under the First and Fourteenth Amendments. The employees discharged in *Elrod* had been employed by the Cook County Illinois Sheriffs Office. They brought a class action suit alleging that the sheriff violated their constitutional rights because the firings were based on either their partisan political affiliation with the out-of-office political party or their nonaffiliation with the "in" party. Acknowledging that the Cook County Sheriffs Office practice of dismissing employees on the grounds of political party affiliation is but one type of the widespread, and historical, practice of political patronage, the Court wrote that political patronage practices place restraints on constitution rights including the freedoms of belief and association. The Court reasoned that any advantage to representative

government achieved through the practice of political patronage is generally insufficient to sacrifice First Amendment rights.

First Amendment rights, however, are not absolute. Restraints may be imposed for appropriate reasons. For an encroachment on an individual's First Amendment right in freedom of expression to survive constitutional muster, the government must show that it has a vital interest to protect. The burden is on the employer to demonstrate that its actions "further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights." *Elrod,* 427 U.s. at 363, 96 S.Ct. at 2685.

As justification for the practice of wholesale patronage dismissals, the public authority in *Elrod* argued that patronage furthers governmental effectiveness and efficiency and ensures that implementation of the new administration's policies will not be obstructed by adherents of the policies of the old administration. Rejecting that argument, the Court held, that limiting patronage dismissals to policymaking positions is sufficient to achieve the governmental goal. *Elrod* delineated no clear line between policymaking and nonpolicymaking positions. It is the nature of the responsibilities given to the employee that is the critical factor. Generally, an employee whose responsibilities are of broad scope is more likely to be a decisionmaker. The political loyalty justification or exception "is a matter of proof, or at least argument, directed at particular kinds of jobs." 427 U.S. at 367, 96 S.Ct. at 2687.

A few years later, in *Branti v. Finkel,* 445 U.S.

507,100 S. Ct. 1287 (1980), the Court expanded on this issue writing "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518, 100 S.Ct. at 1295.

Under the Elrod-Branti analysis, therefore, absent a legal determination that political loyalty is an appropriate job requirement, the employees would be entitled to a trial against the sheriff for a determination of that question as a matter of fact. The issue present here, however, was answered as a matter of law by the Eleventh Circuit in *Terry v. Cook,* 866 F.2d 373, 377 (11th Cir. 1989), involving deputy sheriffs, which drew a "distinction between actions that assert employees' right of expression and actions that challenge discharge decisions based on political patronage." *See also Williams v. City of River Rouge,* 909 F.2d 151(6th Cir. 1 990)(whether political affiliation is an appropriate requirement for a particular position may be decided as a matter of law).

The Relationship Between A Sheriff And His Employees

The Court agrees with the defendant's argument that *Terry* is controlling. There, a newly-elected sheriff refused to reappoint or rehire any of the deputy sheriffs, clerks, jailers, process servers, and investigators who served under his predecessor. The former employees filed a complaint alleging that the new sheriff violated their civil rights when he discharged them for political reasons. The Eleventh Circuit reversed the district court on a holding that the trial judge

erred in using a Connick,[3] free-speech analysis in a case which involves en mass terminations and political patronage practices. *Connick,* according to the 11th Circuit, "did not explore the issue of loyalty and its effect on an employee's performance." *Id* at 376. Furthermore, "[t]he factors identified in *Connick* are not relevant in cases when employees are discharged *en masse* by a prospective employer or supervisor." *Id* Where the retention of employment is conditioned on political allegiance and not on the contents of political expressions, an *Elrod-Branti* test must be applied. Using an *Elrod-Branti* analysis, the 11th Circuit upheld the district court's dismissal of the claims of the deputy sheriffs but reversed the dismissal of the claims of the other employees.

Analyzing the duties and relationship between a sheriff

---

[3] *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684 (1983), examined the firing of an assistant district attorney by the District Attorney for New Orleans. The discharged employee had created a "mini insurrection" in the office by circulating a questionnaire regarding employee grievances. The Court held that a public employee's right of free speech must be balanced against the state's interest in promoting the efficiency of the public services it performs through its employees, citing *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731 (1968). *Pickering* involved a teacher who was dismissed from his public school position for sending a letter to the local newspaper criticizing school board fund-raising decisions. The case holds that a government employee does not relinquish his right to comment on matters of public interest by virtue of accepting governmental employment.

and his deputy under Alabama law[4] the court held that loyalty to an individual sheriff is an appropriate job requirement for the position of a deputy.[5] *Id. at 377.* Relying on a Florida case, *Blackburn v. Brorein,* 70 So. 2d 293, (Fla. 1954), the court wrote "it was never contemplated that the sheriffs of the state must perform the powers and duties vested in them through deputies or assistants selected by someone else." *Id.* at 298. And agreeing with *Whited v. Fields,* 581 F.Supp. 1444, 1456 (W.D. Va. 1984), it quoted, "[t]his court is of the opinion that unless this is the exception that the Court had in mind when it laid down the *Elrod-Branti* principles, then no exception exists. To mandate that a sheriff must accept the deputies that he finds in office simply because they belong to another political party even though he is totally responsible for all their acts is incredible, and beyond the bounds of common sense."

The plaintiffs contend that this case is distinguishable from *Terry, Elrod,* and *Branti.* The factor distinguishing this case from the others is that Sheriff Cochran terminated ten percent of his workforce, while *Elrod, Branti,* and *Terry* dealt with the firing of all employees not loyal to an individual or his political party. At oral argument on the Defendant's Motion for Summary Judgment, the plaintiffs' counsel argued that anything less than 100% is not an *en masse* firing. When

---

[4] The relationship between a sheriff and his deputies under Florida law is almost identical to Alabama law. *See* § 30.07, Fla. Stat. (1993).

[5] As to the remaining plaintiffs, however, the court remanded the case to the district court for a determination of the actual responsibilities of each position.

less than all employees are terminated, according to the plaintiffs, a *Pickering-Connick* free speech analysis is appropriate.

The plaintiffs liken their case to *Stough v. Gallagher,* 967 F.2d 1523 (11th Cir. 1992), where it was held that a Florida sheriff who demoted a deputy on the basis of his campaigning activities was liable for civil damages because his action violated the deputy's First Amendment right of free speech. In *Stough,* Gallagher ran for the position of sheriff against James. The plaintiff, Stough, was a deputy sheriff who campaigned for James and made speeches on his behalf. When Gallagher won the election he demoted Stough from captain to sergeant. Gallagher, relying on *Terry v. Cook,* 866 F.2d 373 (11th Cir. 1989), argued that the demotion did not violate the First Amendment. The 11th Circuit disagreed. It distinguished Stough's actions from those of the employees who were dismissed in the *Elrod-Branti* line of case. Unlike the *Elrod-Branti* cases, Stough was not penalized for supporting the wrong party or person. Rather, Stough was demoted based on the speeches he gave in support of Gallagher's opponent. Such speeches address matters of public concern and occupy "'the highest rung of the hierarchy of First Amendment values,' entitling it to special protection." *Stough,* 967 Fed.2d at 1529. Political speech cases should be analyzed according to the *Pickering-Connick-Ranking* test. Using the *Pickering* test, the 11th Circuit concluded that Gallagher violated Stough's First-Amendment rights of free speech.

Wholesale Or En Mass Firings

Although the *Stough* decision distinguishes between

"free speech" cases and "political patronage" cases, it does not contain a discussion of the difference between firing one deputy and a wholesale or *en masse* firing. It is not necessary to make the distinction because the plaintiffs do not show here that they made political speeches. The complaint alleges that the plaintiffs were Navarro supporters who contributed funds to his campaign. *Compare, Joyner v. Lancaster,* 815 F.2d 20 (4th Cir. 1987) (A newly-elected sheriffs firing of one deputy for loud and open campaigning for the opposition is subject to a *Connick* analysis.)

If it were necessary to reach the question, the Court would hold, as a matter of law, that terminating 70 to 80 key employees, out of a work force of 869, is an *en masse* or wholesale firing--rejecting the plaintiffs' contention that anything less than 100% is selective. Wholesale is defined as "in large bulk or quantity." *The American Heritage Dictionary* 1380 (2d College ed. 1995). A decision on what qualifies as an "en masse" firing is not required, however, because these plaintiffs, as in *Terry,* were terminated on the basis of their loyalty and support for the former sheriff. This is a classic *Elrod-Branti* political patronage dismissal case. The essential issue, whether political affiliation is an appropriate requirement for the job, was answered as a matter of law in *Terry,* which applied *Elrod* principles. Effective performance in the multi-faceted job of local law enforcement, the court concluded, requires a high level of trust and confidence between the sheriff and his or her deputies.

That a sheriff in a 1990's large and diverse metropolitan community should have the power to terminate all 869 deputies, on the basis of a political litmus test, is, as contended, an archaic proposition. *Terry,* however, teaches

that on judicial review of a deputy sheriffs claim of an unlawful political firing, concerns for operational efficiency and work force diversity are irrelevant.

The Defendant's Motion for Summary Judgment is **GRANTED.**

DONE and ORDERED in chambers in Miami, Florida, this 30th day of June, 1995.

WILKIE D. FERGUSON, JR.
UNITED STATES DISTRICT COURT

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Counsel of Record

Supreme Court, U.S.
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No. 97-1310

In The

Supreme Court of the United States

October Term, 1997

RICHARD MARK CUTCLIFFE, VICKI CUTCLIFFE, GEORGE RAGGIO, JR. and CAROLE RAGGIO,

Petitioners,

vs.

KEN JENNE, as Sheriff of Broward County, Florida,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the petition raises any issues of sufficient public importance to warrant review by the United States Supreme Court where the challenged decisions of the Circuit Court of Appeal have been mooted by subsequent state legislation.

2. Whether the decisions of the Eleventh Circuit in *Terry v. Cook* and this case are at odds with this Court's decisions in *Elrod v. Burns* and *Branti v. Finkel.*

3. Whether the Circuit Courts of Appeal have rendered conflicting opinions, warranting review by this Court, regarding the application of the principles espoused in *Elrod* and *Branti* to deputy sheriffs employed in different states.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations ii

Statement of the Case 1

Reasons for Denying the Writ 2

I. The Issues Presented In The Petition Do Not Require Or Warrant Review By The Supreme Court. 2

II. The Eleventh Circuit's Political Patronage Decisions Are Consistent With The Decisions In *Elrod* And *Branti*. 4

III. The Purported Conflict Between The Circuits Is An Illusion. 8

Conclusion 10

TABLE OF CITATIONS

Cases Cited:

Barrett v. Thomas, 649 F.2d 1193 (5th Cir. 1981) 8

Branti v. Finkel, 445 U.S. 507 (1980) .. i, 1, 2, 3, 4, 5, 6, 7, 8

Contents

Page

Brockett v. Spokane Arcades, Inc., 105 S. Ct. 2794, 472 U.S. 491 (1985) 7

Brown v. Trench, 787 F.2d 167 (3rd Cir. 1986) 5

Burns v. County of Cambria, Pennsylvania, 971 F.2d 1015 (3rd Cir. 1992) 8, 9

Elrod v. Burns, 427 U.S. 347 (1976) ... i, 1, 2, 3, 4, 5, 6, 7, 8, 9

Francia v. White, 594 F.2d 778 (10th Cir. 1979) 8

Hall v. Tollett, 128 F.3d 418 (6th Cir. 1997) 8

Haring v. Prosise, 103 S. Ct. 2368, 462 U.S. 306 (1983) 7

Jimenez Fuentes v. Torres Gaztambide, 807 F.2d 236 (1st Cir. 1986) 5

Layne & Bowler Corp. v. Western Well Works, Inc., 43 S. Ct. 422, 261 U.S. 387 (1923) 2

Pembaur v. City of Cincinnati, 106 S. Ct. 1292 (1986) 7

Regents of University of Michigan v. Ewing, 106 S. Ct. 507, 474 U.S. 214 (1985) 7

Terry v. Cook, 866 F.2d 373 (11th Cir. 1989) .... i, 1, 2, 3, 4, 6, 7, 8, 15

Contents

Page

Tomczak v. City of Chicago, 765 F.2d 633 (7th Cir. 1985) 5

Upton v. Thompson, 930 F.2d 1209 (7th Cir. 1991) .. 8

Statutes Cited:

42 U.S.C. § 1983 1

Alabama Statute, Section 17-1-7 3

Fla. Stat. § 30.07 (1993) 7

Fla. Stat. § 30.078 3

STATEMENT OF THE CASE

Petitioners were formerly employed as deputy sheriffs by Respondent's predecessor Sheriff Nick Navarro. Petitioners asserted claims below pursuant to 42 U.S.C. § 1983, alleging that they were unlawfully terminated following the election of Respondent, Sheriff Ron Cochran, because of their political affiliation with Sheriff Navarro.

Following discovery, Sheriff Cochran filed a motion for summary judgment. Following oral arguments before United States District Judge Wilkie Ferguson, an order was entered granting Sheriff Cochran's motion and entering judgment in Sheriff Cochran's favor. In his order, Judge Ferguson held that deputy sheriffs in Florida are among those employees falling into the exception, established in this Court's rulings in *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980), to the general rule prohibiting political patronage terminations. Judge Ferguson's ruling was grounded on his finding that the Eleventh Circuit's decision in *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989), which held that deputy sheriffs in Alabama are subject to political patronage dismissal under *Elrod & Branti*, is applicable to deputy sheriffs in Florida.

Petitioners appealed Judge Ferguson's ruling, which was affirmed by the Eleventh Circuit Court of Appeals. Petitioners then sought rehearing *en banc*, asserting that the Eleventh Circuit's decision in *Terry v. Cook* is at odds with *Elrod* and *Branti*. The Eleventh Circuit denied rehearing *en banc*, and Petitioners subsequently filed this petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

I.

THE ISSUES PRESENTED IN THE PETITION DO NOT REQUIRE OR WARRANT REVIEW BY THE SUPREME COURT.

Petitioners argue that this Court should review the decision of the Eleventh Circuit below for two reasons. First, Petitioners contend that *Terry v. Cook*, the decision relied upon by the Eleventh Circuit in this case, is contrary to this Court's decisions in *Elrod* and *Branti*. Second, Petitioners assert that the Circuit Courts of Appeal are in conflict with regard to the application of the rules promulgated in *Elrod* and *Branti* to the position of deputy sheriff.

In the sections that follow, Respondent will demonstrate that both of these contentions are incorrect. However, before the merits of these issues are addressed in detail, a more fundamental question should be posed; whether these issues, even if genuine, warrant review by this Court.

In this regard, the following pronouncement addressing the question of when petitions for writ of certiorari should be granted is instructive:

> It is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.[1]

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1. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 43 S. Ct. 422, 423, 261 U.S. 387, 393 (1923).

The threshold requirement of a question of public importance is lacking here because the decisions in *Terry v. Cook* and this case have been mooted, respectively, by legislation enacted in both Alabama and Florida in 1995 that prohibit political patronage dismissals.[2] As a result of this legislation, a review of *Terry v. Cook* and the Eleventh Circuit's decision below would not obviate future litigation relating to political patronage dismissals in either Alabama or Florida, nor would it serve any other public purpose.[3]

Therefore, even if the court agrees with Senior District Judge Harris' suggestion that the "subject matter" of political patronage dismissals "cries out for elucidation from the Supreme Court in some appropriate future case," it is apparent that this is not that case.

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2. Alabama Statutes, Section 17-1-7 prohibits actions against state, county and city employees that result in a denial of the right to participate in political activities "to the same extent as any other citizen of the state of Alabama."

Florida Statute 30.078 provides that:

> When a newly elected or appointed sheriff assumes office, the incoming sheriff may not terminate the employment of any deputy sheriff . . . for lawful off-duty political activity or for a discriminatory reason. The incoming sheriff may replace deputy sheriffs assigned to managerial, confidential, or policymaking positions or part-time deputy sheriffs.

3. Neither the decision in *Terry v. Cook* nor the decision below addressed the question of whether deputy sheriffs in Georgia are subject to political patronage dismissal under *Elrod* and *Branti*. This case, therefore, is not an appropriate vehicle for review of the that question.

II.

THE ELEVENTH CIRCUIT'S POLITICAL PATRONAGE DECISIONS ARE CONSISTENT WITH THE DECISIONS IN *ELROD* AND *BRANTI*.

Petitioners assert that the Eleventh Circuit, in both *Terry v. Cook* and this case below, misapplied *Elrod* and *Branti* by failing to engage in an "individual determination" of whether party affiliation is an appropriate requirement for the continued employment of each individual deputy. In fact, it is Petitioners, rather than the Eleventh Circuit, who have misread *Elrod* and *Branti*.

The distinction between the Petitioner's interpretation of the rule articulated in *Elrod* and *Branti* and the actual rule is subtle, but critical. Petitioners suggest that *Elrod* and *Branti* require a review of the duties performed by *each employee* before a court can ratify a decision to terminate their employment on political patronage grounds. This is not a correct reading of these cases because the inquiry contemplated in *Elrod* and *Branti* is not this specific. Rather than addressing the duties performed by each employee, courts must determine whether *each public office* subjected to political patronage dismissal is of the type for which "party affiliation is an appropriate requirement."[4]

The correct analysis is best illustrated by the manner in which this court rendered its decision in *Branti*. There, this court was faced with the question of whether assistant public defenders in Rockland County, New York, could be terminated on political patronage grounds.[5] In answering this question in the negative, this court analyzed the duties inherent in the

4. *Branti*, 445 U.S. at 518.

5. *Id.* at 509.

position of assistant public defender in that jurisdiction, not the duties actually performed by the petitioners.[6]

The requirement of a position by position, rather than an employee by employee, review has been explicitly recognized by a number of Circuits. For example, in applying the *Elrod* and *Branti* rule, the First Circuit noted that "in conducting this inquiry, courts focus on the powers inherent in a given office, as opposed to the functions performed by a particular occupant of that office."[7] Similarly, the Third Circuit has stated that "the relevant inquiry is to the function of the public office in question and not the actual past duties of the particular employee involved."[8] Finally, the Seventh Circuit has emphasized the importance of focusing on the position, rather than the individual employee, in noting that even

> if an officeholder performs fewer or less important functions than usually attend his position, he may still be exempt from the prohibition against political termination is his position inherently encompasses tasks that make his political affiliation an appropriate requirement for effective performance.[9]

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6. *Id.* at 1295.

7. *Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 242 (1st Cir. 1986).

8. *Brown v. Trench*, 787 F.2d 167, 168 (3rd Cir. 1986). It is notable that the Third Circuit, which is among those cited by Petitioners as opposing political terminations of deputy sheriffs, is nonetheless among those Circuits that have confirmed that these determinations are to be made upon a review of the duties of each position, rather than each employee in question.

9. *Tomczak v. City of Chicago*, 765 F.2d 633, 641 (7th Cir. 1985).

Thus, the Eleventh Circuit correctly applied *Elrod* and *Branti* in both *Terry v. Cook* and in this case below. In *Terry v. Cook*, the Court was faced with the question of whether party affiliation is an appropriate requirement for the position of deputy sheriff in Alabama. The court reviewed the nature of the position, rather than the duties performed by individual deputies, and found that:

> Under Alabama law, a deputy sheriff is the general agent of and empowered to enter into business transactions for the sheriff. Any transaction within the scope of the sheriff's duties may be acted upon by his deputy. The deputy sheriff is the alter ego of the sheriff, and the sheriff is civilly liable for actions committed by a deputy done in the performance of his duty.[10]

Based on this analysis of the nature of a deputy sheriff in Alabama, the Eleventh Circuit found that "the closeness and cooperation required between sheriffs and their deputies necessitates the sheriff's absolute authority over their appointment and/or retention."[11]

In this case, the question of whether the *Terry v. Cook* analysis of deputy sheriffs in Alabama is applicable to deputy sheriffs in Florida was raised. The district court reviewed the

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10. 866 F.2d at 377 (citations omitted).

11. *Id.* The court also found that the sheriff had not established that the positions of clerk, investigator, dispatcher, jailer and process server in Alabama involve responsibilities that subject them to political patronage termination, and noted that "such positions traditionally revolve around limited objectives and defined duties and do not require those holding them to function as the alter ego of the sheriff." *Id.* at 377-8.

nature of the position and found that "the relationship between a sheriff and his deputies under Florida law is almost identical to Alabama law."[12] As a result, the court found that the decision in *Terry v. Cook* could be extended to deputy sheriffs in Florida.

Thus, contrary to Petitioners' contention, in both *Terry v. Cook* and this case, the Eleventh Circuit sufficiently reviewed the nature of the positions of deputy sheriff in Florida and Alabama, and correctly applied the principles espoused in *Elrod* and *Branti*. Furthermore, as these decisions were dependent on reasonable interpretations of state law, this Court should leave the rulings undisturbed pursuant to the long-standing doctrine that this Court will "generally accord great deference to the interpretation and application of state law by the courts of appeals."[13]

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12. Order Granting Summary Judgment, at note 4, *citing* Fla. Stat. § 30.07 (1993).

13. *Pembaur v. City of Cincinnati*, 106 S. Ct. 1292, 1301 n.13 (1986); *see also Regents of University of Michigan v. Ewing*, 106 S. Ct. 507, 513 n.10, 474 U.S. 214 (1985) ("In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable."); *Brockett v. Spokane Arcades, Inc.*, 105 S. Ct. 2794, 2800, 472 U.S. 491, 500 (1985) ("Normally, the court defers to the constructions of a state statute by lower federal courts."); *Haring v. Prosise*, 103 S. Ct. 2368, 2373 n.8, 462 U.S. 306, 314 n.8 (1983) ("it is our practice to accept a reasonable construction of state law by the court of appeals.").

III.

THE PURPORTED CONFLICT BETWEEN THE CIRCUITS IS AN ILLUSION.

Petitioners next argue that this Court should review the Eleventh Circuit's decision below because the Circuit Courts of Appeal are divided on the issue of whether deputy sheriffs can, under *Elrod* and *Branti*, be subjected to political patronage terminations.[14] These Circuit decisions do not, however, reflect a conflicting analysis of a single issue. Rather, these cases demonstrate that deputy sheriffs in different parts of this country have different duties and responsibilities. As a result, some deputy sheriffs occupy positions for which political affiliation is an appropriate prerequisite, while others do not.

This point is illustrated through a comparison of the Circuits' discussions of the nature of the positions of deputy sheriff in the states in which their cases arose. For example, as was stated previously, the Eleventh Circuit in *Terry v. Cook* found that, in Alabama, deputy sheriffs are essentially the "alter ego" of the sheriff, and are therefore subject to dismissal for political reasons.[15] In doing so, however, the court noted that the positions of clerk, investigator, dispatcher, jailer and process

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14. The Seventh and Fourth Circuits have found that deputy sheriffs in Illinois and North Carolina, respectively, are subject to dismissal on this ground. *See Upton v. Thompson*, 930 F.2d 1209, 1218 (7th Cir. 1991). The Third, Fifth, Sixth and Tenth Circuits have found that deputy sheriffs in Pennsylvania, Texas, Tennessee and New Mexico, respectively, are not. *See Burns v. County of Cambria, Pennsylvania*, 971 F.2d 1015, 1023 (3rd Cir. 1992); *Barrett v. Thomas*, 649 F.2d 1193, 1201 (5th Cir. 1981); *Hall v. Tollett*, 128 F.3d 418, 429 (6th Cir. 1997); *Francia v. White*, 594 F.2d 778, 782 (10th Cir. 1979) (pre-*Branti*).

15. 866 F.2d at 377.

server which, in Alabama, are not among those classified as deputy sheriffs, may not be subject to political patronage dismissals.[16]

Compare these findings to those that supported the decision of the Third Circuit in *Burns v. County of Cambria, Pennsylvania.* There, the court found that deputy sheriffs in the Cambria County Sheriff's Office "primarily perform three tasks: they serve process; they transport prisoners to court and between facilities; and they provide security for courtrooms." [17] The court further noted that there was no basis to find that "the sheriff himself performs any policy making function or that he relies on his deputies for any policy-type duties."[18]

Obviously, the descriptions of the duties inherent to the position of deputy sheriff in Alabama and Cambria County, Pennsylvania are extremely varied. In fact, it appears that deputy sheriffs in Cambria County have more in common with Alabama's process servers and jailers than they do with Alabama's deputy sheriffs. Thus, while, on the surface, both the Eleventh and Third Circuits considered the question of whether a position titled "deputy sheriff" is subject to termination for political reasons, the suggestion that these Circuits addressed identical factual issues, and that their legal conclusions are conflicting, is ludicrous.

Therefore, as no conflict between the Circuit Courts of Appeal has been identified, Petitioners have not demonstrated the need for review by this Court.

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16. *Id.* at 378.

17. 971 F.2d at 1022.

18. *Id.* at 1023.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied by this court.

Respectfully submitted,

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No. 97-1310

In The

Supreme Court of the United States

October Term, 1997

RICHARD MARK CUTCLIFFE, VICKI CUTCLIFFE, GEORGE RAGGIO, JR. and CAROLE RAGGIO,

Petitioners,

vs.

KEN JENNE, as Sheriff of Broward County, Florida,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

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10 pp

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Argument	1
1. Post-Termination State Legislation Did Not "Moot" the First Amendment Issues Presented by the Decision Below	1
2. *Branti's* Mandate to Examine the Need for Party Affiliation Inherent in the "Public Office" Does Not Preclude Consideration of the Public Employee's Duties, and Presents a Substantial Federal Question Fairly Contained in Petitioners' Questions Presented	3
Conclusion	7

TABLE OF AUTHORITIES

Cases **Page**

Barrett v. Thomas, 649 F.2d 1193 (5th Cir. 1981), *cert. denied* 456 U.S. 925 (1982) 4, 6
Branti v. Finkel, 445 U.S. 507 (1980) . . . . . *passim*
Dickeson v. Quarberg, 844 F.2d 1435 (10th Cir. 1988) . 6
Elrod v. Burns, 427 U.S. 347 (1976) . . . . . *passim*
Gordon v. Rockland Co., 110 F.3d 886 (2d Cir.), *cert. denied* 118 S.Ct. 74 (1997) 6
Horton v. Taylor, 767 F.2d 471 (8th Cir. 1985) 6
Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923) 3
McCrerey v. Allen, 118 F.3d 242 (4th Cir. 1997) 5
Peters v. Delaware River Port Auth., 16 F.3d 1346 (3d Cir.), *cert. denied* 513 U.S. 811 (1994) . . . 6
Terry v. Cook, 866 F.2d 373 (11th Cir. 1989) 1, 2
Waskovich v. Morgano, 2 F.3d 1292 (3d Cir. 1993) 5

Constitutional Provisions

U.S. Const., Amend. I 1,3,4,5,6

Statutes

§ 30.071, Fla. Stat. 1, 2
§ 30.071(3), Fla. Stat. 3
§ 30.072, Fla. Stat. 3
§ 30.073(5), Fla. Stat. 2
§ 30.071 - 30.079, Fla. Stat. 1, 5

ARGUMENT IN REPLY

1. Post-Termination State Legislation Did Not "Moot" the First Amendment Issues Presented by the Decision Below

Respondent Broward County Sheriff Jenne argues that "the decisions in *Terry v. Cook* [866 F.2d 373 (11th Cir. 1989)] and this case have been mooted . . . by legislation enacted in . . . Florida in 1995 that prohibit political patronage dismissals." Br. in Opp. 3 (footnote omitted); *see* Pet. Cert. 5 n. 2 (noting post-termination changes in state law). The relevant Florida legislation, Sections 30.071 - 30.079, Florida Statutes, precludes patronage dismissals of most, but not all, deputy sheriffs, but does not apply to Petitioners.

Those statutes were enacted after the terminations of these Petitioners and do not moot their claims. And Respondent's hopeful speculation that future disputes like this one will be averted by state law, and that this Court should therefore decline review, errs for another reason. Deputy sheriffs in Broward County, and others elsewhere in Florida, are legislatively exempted from the procedures contained in the statutes offered by Respondent. Section 30.071, Fla. Stat. (1997), provides:

> **30.071 Applicability and scope of act. –**
>
> (1) This act applies to all deputy sheriffs, *with the following exceptions:*

* * *

> (b) Deputy sheriffs in a county that, by special act of the Legislature, local charter, ordinance, or otherwise, has established a civil or career service system which grants collective bargaining rights for deputy sheriffs, *including*, but not limited to, deputy sheriffs in the following counties: *Broward*, Dade, Duval, Escambia, and Volusia. [Emphasis supplied].

* * *

Thus, in those counties which are exempted - like Broward County (with over *800* deputies) - relief for deputies who allege they were unconstitutionally terminated for political patronage reasons is foreclosed by the Eleventh Circuit's decision in this case, and by *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989). Both decisions eschewed any meaningful assessment of the nature of the various deputies' positions, instead announcing a *per se* rule permitting patronage dismissal of *all* deputies; a rule which conflicts with *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980). *See* discussion *infra* at 3-6.[1]

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[1] Ironically, in those counties where the Florida statutes do apply, their *Elrod-Branti* principles would offer protection similar to the Constitution. "A deputy sheriff covered by §§ 30.071-30.079, other than the undersheriff or chief deputy, who is regularly appointed to his or her position may not be terminated for lawful off-duty political activity or for a discriminatory reason." § 30.073(5), Fla. Stat. Thus, despite the acknowledged "alter ego" relationship between a Florida sheriff and his or her deputies, § 30.071(3), Fla. Stat., for political

Contrary to Respondent's view, the issues presented in this case will recur in Florida (and in other states) despite changes in state law. This Court should grant review to resolve what is undeniably a "real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals,"[2] which are struggling to apply the *Elrod-Branti* First Amendment formulation in sheriffs' deputy political patronage dismissal cases. *See* Pet. Cert. at 8 and 8a-9a and 9a, n. 3 (citing conflicting decisions of the circuit courts).

2. *Branti's* Mandate to Examine the Need for Party Affiliation Inherent in the "Public Office" Does Not Preclude Consideration of the Public Employee's Duties, and Presents a Substantial Federal Question Fairly Contained in Petitioners' Questions Presented

Respondent argues that there is no conflict between the decision below and *Branti*, because *Branti* requires courts to examine the need for political loyalty inherent in the "public

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patronage purposes Florida law clearly recognizes that not all deputies' positions require political loyalty. *See also* § 30.072 (defining "deputy sheriff" for purposes of the political patronage protections and excluding and defining those who perform "managerial, confidential, or policymaking duties").

[2] *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923); Br. in Opp. 2 and n. 1.

office," 445 U.S. at 518, and the Eleventh Circuit held that the *position* of sheriff's deputy was subject to patronage dismissal, regardless of any individual deputy's responsibilities. Br. in Opp. 4-6. That argument -- a view not uniformly held by the lower courts construing *Branti* -- merely raises another important and unanswered question of federal law which is worthy of review.

Branti did not present the question of whether a "public office" which is nominally shared by 869 persons can be sufficiently homogeneous to allow a court to squeeze *all* of those people into the narrow exception to the general *Elrod-Branti* rule that patronage dismissal of public employees violates the First Amendment.[3] The Eleventh Circuit's decision placing all deputies within the exception to *Elrod-Branti* impermissibly widens the intended narrow exception and renders meaningless the general proscription against political patronage dismissals of public employees. It is also in conflict with the Fifth Circuit, which held in *Barrett v. Thomas*, 649 F.2d 1193 (5th Cir. 1981), *cert. denied* 456 U.S. 925 (1982), that patronage dismissal of deputies in a large sheriff's office (Dallas County, Texas) violated *Elrod-Branti*. "In a sheriff's department with more than 700 employees, including approximately 550 deputies, the absence of political cohesion between sheriff and deputy can hardly be said to undermine an intimate working relationship. The rule of *Elrod v. Burns*, not the exception, applies here." *Id.* at 1201.

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[3] The number of Broward County Sheriff's Deputies was stipulated in the district court. Of the 869 deputies, there were 116 sergeants, 36 lieutenants, 16 captains, and 5 majors.

Although the ultimate question of the constitutionality of the dismissal of a public employee for political reasons is one of federal law, state law is a relevant factor in determining whether the government employer "can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518. *See Waskovich v. Morgano*, 2 F.3d 1292, 1297 (3d Cir. 1993) ("A significant way to determine the functions inherent in a particular position is to examine relevant state statutes, for `[a]lthough state law is not necessarily dispositive of the inquiry whether an employee is a confidant, policymaker or other employee for whom political affiliation is appropriate under *Elrod*, it is an important and influential factor.' *Zold*, 935 F.2d at 640.").[4]

Here, state law has now differentiated sheriffs' deputies into categories of those who are and those who are not subject to political patronage dismissals. §§ 30.071 - 30.079, Fla. Stat. (1997). Regardless of whether those categories are constitutionally sound as drawn, the fact that all deputies are *not* treated the same under Florida law for patronage purposes undercuts Respondent's argument that the

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[4] *But see McCrerey v. Allen*, 118 F.3d 242 (4th Cir. 1997), upholding patronage dismissal of the Administrator for Regulatory Programs of Virginia Department of Professional and Occupational Regulation, and finding that political affiliation was an "appropriate requirement" for the position under *Elrod-Branti*, despite a state anti-patronage law. "[W]hether a patronage-based dismissal violates the First Amendment is ultimately a question of federal law." *Id.* at 244.

"public office" of sheriff's deputy must be evaluated without regard to the duties of a particular deputy in a force of 869 deputies.

This Court's statement in *Elrod* that "[t]he nature of the responsibilities is critical," 427 U.S. at 367, remains true. Other courts agree. *See Peters v. Delaware River Port Auth.*, 16 F.3d 1346, 1352 (3d Cir.) ("we examine the functions performed by the individual occupying the relevant position"), *cert. denied* 513 U.S. 811 (1994); *Dickeson v. Quarberg*, 844 F.2d 1435, 1442 (10th Cir. 1988) ("We focus on the inherent powers of the positions as well as on the actual duties performed"); *Horton v. Taylor*, 767 F.2d 471, 477 (8th Cir. 1985) ("The *Branti* test is a functional one, focusing on the actual duties an employee performs"); *compare Gordon v. Rockland Co.*, 110 F.3d 886 (2d Cir.), *cert. denied* 118 S.Ct. 74 (1997) (discerning duties inherent in the offices held by assistant county attorneys by examining their differing job descriptions).

Any realist must acknowledge the inevitably widely divergent nature of responsibilities among 869 deputies. *See Barrett v. Thomas*, *supra* at 4. Consistent with *Elrod-Branti*, they should not *all* be subject to patronage dismissal. The decision below concluded otherwise. Review is warranted.

CONCLUSION

For the foregoing reasons, and those contained in the petition for writ of certiorari, certiorari should be granted, the decision below reversed, and the case remanded for trial under the correct First Amendment standards, whatever they may be.

Respectfully submitted,

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